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No. 522

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FILED
NOV. 26 1962
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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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HENRY S. MORGAN, ET AL., PETITIONERS

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, IN OPPOSITION

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Petitioners are unsuccessful applicants for non-competitive oil and gas leases. They seek review of the decision of the Secretary of the Interior, affirmed by both courts below, which rejected their applications and issued a lease to respondent Wallis. The lands in controversy are 826 acres on the narrow banks at the mouth of the Mississippi River known as Southwest Pass, Plaquemines Parish, Louisiana

(see green area on map at R. 230A).[1] The lands were not in existence in their present form in 1836 when the only official survey of the area was made (R. 276, 664A), and came into existence thereafter "as a result of subterraneous upheavals plus accretions to the islets and mud lumps which were formed by this upheaval, accretions to the then mainland and existing islands, and to artificially constructed jetties and dikes" (R. 248).

In 1903 the State of Louisiana, which then claimed title to lands at Southwest Pass, issued a patent to certain of those lands to one George Jurgens (R. 268). Jurgens deeded the lands to the United States shortly thereafter, and it is the accretions to these Jurgens' lands which are the subject of the petitioners' applications (*ibid.*). Since that time the Jurgens' lands and the accretions to them have been used by the United States, under the administration of the Department of the Army, for river and flood control purposes (R. 606).

Commencing in 1954 petitioners and respondent Wallis filed applications for mineral leases on these lands. Each applicant filed separate applications, first pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) which establishes the procedures for the leasing of "public lands" of the United States and second pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351 *et seq.*) which, as indicated by its title, governs the leasing of acquired lands

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[1] "R. —" refers to the printed joint appendix in the court of appeals.

(R. 602-604). In so doing each obviously sought protection against the possibility that the United States held title to the subject lands as part of the public domain rather than by purchase.[2]

After an extensive study of the issues involved, the Director of the Bureau of Land Management determined that title to the lands in question had never passed to the State of Louisiana and that they had been part of the public domain since they first came into existence (R. 249-273). On review, the Secretary of the Interior affirmed the decision of the Director and accordingly rejected all the lease applications filed pursuant to the Mineral Leasing Act for Acquired Lands (R. 605-606). Turning to the public lands lease applications, the Secretary found that the application of petitioner Morgan, first in time, was defective and granted the next complete application which was that of respondent Wallis (R. 606-615).

On cross motions for summary judgment (R. 61-64, 738),[3] the district court held that there was substantial evidence to support the Secretary's rejection of petitioner Morgan's applications and his grant of Wallis' public lands application and that the Secre-

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[2] As the application requirements under the two statutes differ, an applicant who is in doubt as to the origin of the United States' title, may file two applications, one under each statute, to insure consideration of his claim. Cf. *Seaton* v. *Texas Co.*, 256 F.2d 718 (C.A.D.C.).

[3] The administrative record before the Department of the Interior (R. 65-737) was stipulated as part of the record before the district court (R. 65).

tary was not arbitrary or capricious in reaching that decision. Accordingly, the court denied petitioners' motion for summary judgment, granted respondents' motions and dismissed the action (R. 753). On appeal the court of appeals affirmed (Pet. App. 13-16).

Petitioners' sole contention is that the Secretary of the Interior was bound to hold that the lands in issue are "acquired lands"—subject to lease under the Mineral Leasing Act for Acquired Lands—because they were "purchased by the United States in 1903 for river and flood control purposes with title approved by the Attorney General, and ever since that time continuously held for the same purposes under the jurisdiction and administration of the Department of the Army * * *" (Pet. 2).[4] Petitioners do not deny, and, therefore, we assume for purposes of this case, that the United States held title to these lands in 1954; their applications—in the pursuit of which the petition has been filed—could not possibly be granted unless the federal government has the title.[5] Their only argument, therefore, is that the

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[4] The petition raises no question concerning the Secretary's determinations, affirmed by both courts below, that the public lands lease application submitted by petitioner Morgan was defective in that the land sought to be leased was not properly identified, as required by the regulations of the Department of the Interior (see R. 606-611), and that the application of respondent Wallis was proper (R. 612-615).

[5] To the extent that the lands in issue here are islands arising in the marginal sea, petitioners do not deny, and, therefore, we assume for purposes of this case, that the decisions of this Court in *United States* v. *California*, 332 U.S. 19, and *United States* v. *Louisiana*, 339 U.S. 699, are ap-

prior purchase estopped the Secretary from making any further investigation into the true sources of federal ownership.

Both courts below properly rejected petitioners' contention. There is no conflict of decisions, and the question decided does not warrant further review. The Secretary of the Interior is charged with responsibility for administration of the mineral leasing statutes. In ruling upon claims for leases under these statutes, he must determine whether the lands in question are public domain lands or lands acquired by purchase. *McKenna* v. *Seaton*, 259 F. 2d 780 (C.A. D.C.); *Barash* v. *Seaton*, 256 F. 2d 714 (C.A. D.C.); *Seaton* v. *Texas Co.*, 256 F. 2d 718 (C.A. D.C.); see *Haley* v. *Seaton*, 281 F. 2d 620 (C.A. D.C.); *Justheim* v. *McKay*, 123 F. Supp. 560 (D. D.C.), affirmed, 229 F. 2d 29 (C.A. D.C.). The fact that various public officials in the past may have acted on the assumption that the lands in issue here were initially not a part of the public domain does not deprive the Secretary of the Interior of responsibility and authority to determine their true classification for purposes of administration of the mineral leasing statutes.[6]

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plicable to such islands. Further, the petition necessarily makes no argument that the United States, by the time of these applications, had divested itself of title to the lands in issue by means of the Submerged Lands Act of May 22, 1953 (67 Stat. 29).

[6] The mistake of previous government officials as to the correct status of these lands did not relieve the Secretary from executing the laws of Congress in accordance with the

There is no merit to petitioners' further contention that, in the circumstances of this case, the Secretary of the Interior had no authority to lease the subject land without the consent of the Department of the Army, which at one time considered it to be under its jurisdiction as acquired land. This question was neither raised nor decided before the administrative agency or the courts below. Moreover, petitioners do not have standing to raise the issue whether the Secretary's action was in violation of the rights of the Department of the Army.[7]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962.

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true status of the land. *United States* v. *California*, 332 U.S. 19; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 31-32; *City and County of San Francisco* v. *United States*, 223 F. 2d 737, 739 (C.A. 9), certiorari denied, 350 U.S. 903.

[7] *Frothingham* v. *Mellon*, 262 U.S. 447; *Fairchild* v. *Hughes*, 258 U.S. 126, 129.

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